IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 898 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DAMOMAL RAMANDAS

Versus

MAHENDRA MULSHANKER VYAS HEIRSOF MJ VYAS

Appearance:

MR SURESH M SHAH for Petitioner

MR JR NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 14/06/2000

ORAL JUDGEMENT

1. This is a revision u/s 29[2] of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 at the instance of the tenant [original defendant], who was sued by the respondent [landlord] for a decree of eviction on the ground that the tenant had committed breach of the

terms and conditions of tenancy and therefore, was liable to be evicted under the provisions of section 12[1] of the said Act.

2. Before proceeding with the merits of the matter, it would be pertinent to bear in mind the principles laid down by the Supreme Court while dealing with the revisions arising u/s 29[2] of the said Act. The Supreme Court in the case of Patel Valmik Himatlal & Ors. v/s Patel Mohanlal Muljibhai [1998(2) GLH 736] = AIR 1988 SC 3325, while approving and reiterating the principles laid down in its earlier decision in the case of Helper Girdharbhai v/s Saiyad Mohmad Mirasaheb Kadri [AIR 1987 SC 1782], held that High Court cannot function as a court of appeal, cannot reappreciate the evidence on record, cannot discard concurrent findings of fact based on evidence recorded by the courts below, and cannot interfere on grounds of inadequacy or insufficiency of evidence, and cannot interfere, except in cases where conclusions drawn by the courts below are on the basis of no evidence at all, or are perverse. A different interpretation on facts is also not possible merely because another view on the same set of facts may just be possible.

3. At the outset, it may be stated for the record that the only point urged by the learned counsel for the petitioner - tenant in the present revision is as regards the alleged breach of only one of the terms and conditions of tenancy, and therefore that is the only point which requires to be considered in the present revision. There is no dispute on the material facts.

4. The rent note which is the subject matter of contract of tenancy between the parties is at exh.22 on record. The contractual rent between the parties is Rs.32/- per month. Para 2 of the said rent note specifically contemplates, (the loose and relevant translation of which is) as under :-

> "For the purpose of lighting, I am to use 15 watts bulb."

4.1 The plaintiff filed suit on the ground that the defendant was in fact using an electric bulb of 60 watts which amounted to breach of the terms and conditions of tenancy, and in particular the condition as regards using a bulb of only 15 watts. Although the plaintiff alleges the defendant to have used a bulb of 60 watts, ultimately the defendant has admitted the user of a bulb of 40 watts. At least on this fact, there is no controversy.

5. Both the Courts below came to the conclusion that when the defendant used a bulb of 40 watts for lighting the premises, the defendant committed breach of clause [2] of the said contract of tenancy, since the said contract conferred a right upon a tenant to use a bulb of only 15 watts power, and on account of this breach, the defendant was liable to be evicted.

6. In the context of the above findings, learned counsel for the petitioner - tenant firstly contended that the relevant term of the rent note is not framed in the form of a negative covenant which would restrict the tenant from using a bulb of larger power, and/or that the said term could not be considered to be one of the terms and conditions of tenancy, and at best could only be considered to be a personal obligation, the breach of which could not result in the invocation of section 12[1] of the said Act.

6.1 In the context of this submission, it must firstly be observed that the contract of tenancy at exh.22 between the parties makes certain aspects very clear. Obviously the rent is quantified at Rs.32/- per month. It is equally obvious that although the tenant is permitted to use a bulb of 15 watts power, there is no obligation on the tenant to pay any electricity charges. It is therefore obvious and indisputable that the rent is inclusive of electricity charges. Under the circumstances, it can only be found that this clause of the rent note creates mutual rights and obligations as between the landlord and tenant namely, that the landlord would not be entitled to charge separately for electricity charges, and that the rent of Rs.32/- per month would include the electricity charges to be borne by the landlord, against which the tenant has a right to use a 15 watt bulb for the purpose of lighting the premises, and such use shall be free of any additional charge.

6.2 I cannot possibly conceive of any legitimate submission which would suggest that these mutual rights and obligations created by clause [2] of the rent note are dehors the terms of tenancy, so as to classify it as merely a personal obligation of the tenant.

6.3 Learned counsel for the tenant emphatically asserted that the rent note merely mentions that the tenant "may use" or "shall use" a 15 watt bulb, and that this averment or assertion cannot in any possible manner be construed as a negative covenant. According to him,

therefore if there is an absence of a negative covenant, a breach thereof could not possibly result in the breach of one of the terms and conditions of tenancy. I fail to see this academic and/or linguistic distinction between a positive covenant and a negative covenant. A negative covenant may assume a larger importance where it is introduced into a contract for the very intended purpose of specifically prohibiting what may otherwise be permissible. However, when there is a positive assertion which explicitly and in an unambiguous terms restricts the right of a tenant to use a light bulb specifically of 15 watts power, it necessarily follows, without the necessity of any negative covenant, that the tenant shall not use a bulb of any higher power.

6.4 However, learned counsel for the tenant sought to rely upon a decision of this Court in the case of Rabari Prabhat Harji reported at 21 G.L.R. page 734. This Court in dealing with the principle of restrictive covenant in the context of section 12[1] of the Act observed that where a rent note prohibits a tenant from making use of the adjacent land, such covenant does not relate to land given in tenancy but to the adjacent land, and when the tenant encroaches upon the adjacent land, he becomes a trespasser simpliciter. Such restricted covenant does not cast any obligation regarding the subject matter of the tenancy, and it is therefore a personal obligation only, and such personal obligation or personal covenant cannot be equated with the breach of conditions of tenancy. There cannot be any serious controversy as regards the principle laid down. However, it is also necessary to observe the logic and reasoning behind the principle laid down in the said decision. the basic logic appears to be that when the tenant encroaches upon the adjacent land, the land which is encroached upon is not subject matter of tenancy, and that therefore, when he encroaches upon such adjacent land, he does not do so as a tenant but as a trespasser simpliciter. Since the encroachment is not necessarily in his capacity as a tenant, such trespass cannot be regarded to be in breach of terms and conditions of service. It is obvious that this decision would not apply to the facts and circumstances of this case for the simple reason that the power of the bulb which the tenant was permitted to use was specified at 15 watts in the rent note, and to my mind, by necessary implication, the use of any larger bulb of greater power was not permissible under the terms of the rent note.

7. Learned counsel for the petitioner also sought to rely upon a decision of this Court in case of Bhabhutmal

Rikhbaji Sharma reported at 21 G.L.R. page 242 where in the context of rent note providing that the premises were to be used for a particular business in the shop and no other business would be carried on, and where there was another clause providing that the premises were not to be used for residence etc., such restrictive covenants prohibiting the change of user would not entitle the landlord to recover possession unless it results in substantive injury or damage to the property.

7.1 In view of the various recent decisions of the Supreme Court in last two years, in my opinion, this is no longer good law. The Supreme Court has emphatically laid down that the terms and conditions of tenancy are merely a contract between two willing parties pertaining to the letting and use of the property, and whether the covenants recited therein are in positive or negative form each are equally enforceable, and if either a positive or a negative covenant is breached, it would amount to a violation of the terms and conditions of tenancy. It is not therefore possible to conclude that even if there is a breach of such covenant, the same would not amount to a breach in the terms and conditions of tenancy unless a specific and substantial injury or damage to the property is pleaded and proved.

8. Learned counsel for the petitioner - tenant also contended that the principle of waiver ought to be held against the landlord inasmuch as according to the tenant, he had been using a bulb of a larger power from the very beginning, and the landlord has chosen to file a suit after many years. Thus, the principle of waiver and/or acquiescence would or should prevent the passing of a decree of eviction.

9. To my mind, this is neither here nor there for the simple reason that this contention is raised in the present revision for the first time, with the result that the Courts below have had no occasion to deal with the contention on the basis of the facts and evidence on record. Had this contention been raised in the trial Court, appropriate evidence would have been led by both the parties, and such evidence would be available for appreciation both before the trial Court and the lower appellate Court. For this reason, I am not inclined to enter into this contention any further.

10. Learned counsel for the petitioner further contended that section 12[1] of the said Act would at best enable a landlord to recovery of possession of premises in case the tenant commits breach of any terms

and conditions of the tenancy, provided that such terms and conditions of tenancy are consistent with the provisions of the Rent Act. According to him, on the facts of the case, section 12[1] would not apply for the simple reason that clause [2] of the rent note which restricts the right of the tenant to use a bulb of 15 watts power is a condition which is inconsistent with the provisions of this Act. It is however one thing to allege that such a condition is inconsistent with the provisions of the Act, and an another thing to establish this contention. I am satisfied that condition No.2 which is a subject matter of controversy in the present revision application, does not in any manner contravene the provisions of the Rent Act. This contention is therefore also rejected.

11. The another contention sought to be raised by learned counsel for the tenant is that the rent note at exh.22 is an unilateral document executed by the tenant in favour of the landlord, which is signed only by the tenant and not by the landlord. On the basis of this assertion, it is sought to be urged that the same would not amount to contract and therefore, would not be binding upon the tenant. This submission is merely recorded for being rejected inasmuch as both the parties in both the Courts below have accepted this document and have acted upon the same as a contract between the landlord and tenant, and as a valid document which creates reciprocal rights and obligations as between the landlord and tenant. This contention is therefore also rejected.

12. In the premises aforesaid, I find there is no substance in the present revision application and the same is accordingly dismissed. Rule discharged with no orders as to costs. Interim relief stands vacated.

13. At this stage, learned counsel for the tenant seeks stay of operation of the present judgement and order with a view to approach the Supreme Court. For this specific purpose, this judgement is stayed and the interim relief granted earlier in the revision application is extended upto 11th August 2000.

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